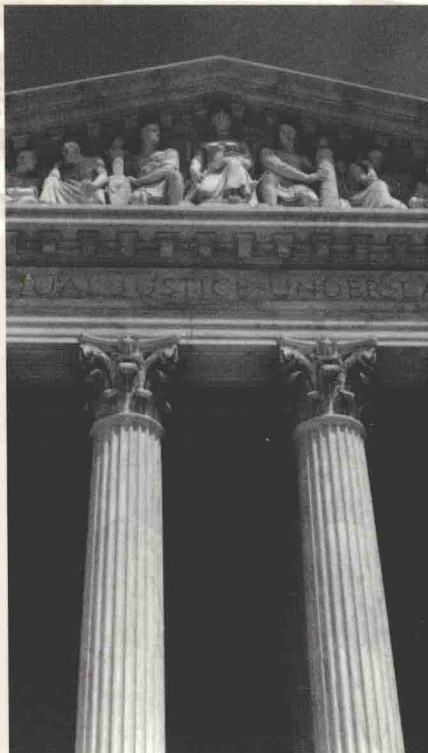


Lee Epstein and Thomas G. Walker

Constitutional Law for a Changing America

Rights, Liberties, and Justice



T H I R D E D I T I O N

CONSTITUTIONAL LAW FOR A CHANGING AMERICA

RIGHTS, LIBERTIES, AND JUSTICE

THIRD EDITION

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CONSTITUTIONAL LAW FOR A CHANGING AMERICA

RIGHTS, LIBERTIES, AND JUSTICE

In honor of our parents

Ann and Kenneth Spole

Josephine and George Walker

PREFACE

Six years have passed since *Constitutional Law for a Changing America: Rights, Liberties, and Justice* made its debut in a discipline already supplied with many fine casebooks by law professors, historians, and social scientists. We believed then, as we do now, that there was a need for a fresh approach because, as political science professors who regularly teach courses on public law, and as scholars concerned with judicial processes, we saw a growing disparity between what we taught and what our research taught us.

We had adopted books for our classes that focused primarily on Supreme Court decisions and how the Court applied the resulting legal precedents to subsequent disputes, but as scholars we understood that to know the law is to know only part of the story. A host of political factors—internal and external—influence the Court's decisions and shape the development of constitutional law. Among the more significant forces at work are how lawyers and interest groups frame legal disputes, the ideological and behavioral propensities of the justices, the politics of judicial selection, public opinion, and the positions elected officials take, to name just a few.

Because we thought no existing book adequately combined the lessons of the legal model with the influences of the political process, we wrote one. In most respects, our book follows tradition: readers will find, for example, that we include the classic cases that best illustrate the development of constitutional law. But our focus—and even the appearance of this volume—is different. We emphasize the arguments raised by lawyers and in-

terest groups and include tables and figures on Court trends, profiles of influential justices and organizations, and other materials that bring out the rich political context in which decisions are reached. As a result, students and instructors will find this work both similar to and different from casebooks they may have read before.

Integrating traditional teaching and research concerns was only one of our goals. Another was to animate the subject of public law. As instructors, we find our subject inherently interesting—to us public law is exciting stuff. The typical constitutional law book, however, could not be less inviting in design, presentation, or prose. That kind of book seems to dampen enthusiasm. We have written a book that we hope mirrors the excitement we feel for our subject. Along with cases excerpted in the traditional manner, we have included full descriptions of the events that led to the suits, photographs of litigants, and relevant exhibits from the cases. We hope these materials demonstrate to students that Supreme Court cases are more than just legal names and citations, that they involve real people engaged in real disputes. Readers will also find reference material designed to enhance their understanding of the law—information on the Supreme Court decision-making process, the structure of the federal judiciary, material on briefing court cases, a glossary of legal terms, and biographical information on the justices.

In preparing this third edition, we have strengthened the distinctive features of the earlier versions by making changes at all three levels of the book—organization,

chapters, and cases. Beginning with the organization of the volume, we added a new chapter on judicial power, in which we consider major institutional powers and constraints. We made this change in response to the comments of many instructors, who want to provide their students with a brief introduction to judicial review and concepts pertaining to the Court's ability to accept cases, such as jurisdiction, justiciability, and standing. We wholeheartedly endorse this sentiment, for we too found ourselves covering judicial power and constraints in our civil liberties classes and were forced to rely on supplemental material. The new chapter eliminates that problem.

The most significant changes are in the individual chapters. All have been thoroughly updated, containing opinions handed down during the 1994, 1995, and 1996 terms. Where relevant, we also updated the narrative to take into account of recent events in the legal and political environments. The chapter on religion, for example, now includes a discussion of the Religious Freedom Restoration Act; the chapter on discrimination describes recent events surrounding the affirmative action debate; and those discussing freedom of expression, obscenity and libel, and privacy consider legal issues associated with the "information age," especially the astronomical growth of the World Wide Web.

Several chapters have been substantially revised, notably "Discrimination." We rewrote the sections on race and sex discrimination to emphasize major doctrinal changes occurring over the past three decades and to highlight recent political and legal controversies. Readers will also find changes in the section on remedies for discrimination. We reorganized the material, moving some of the discussion of school desegregation to follow the Court's ruling in *Brown v. Board of Education* and focusing the remaining material directly on school busing and affirmative action.

Finally, we made two kinds of changes in our presentation of Court cases. First, we added more excerpts of concurring and dissenting opinions; in fact, virtually all cases analyzed in the text now include one or the other or both. Although these opinions lack the force of precedent, they are useful in helping students to see alterna-

tive points of view. Second, we have noted universal resource locators (URLs) to the full text of the opinions and, where available, to a web site containing oral arguments in many landmark cases. We took this step because we recognize how rewarding it can be to read decisions in their entirety and to listen to oral arguments, which, we believe, helps students to develop an important skill—differentiating between viable and less-viable arguments. Also worth noting is that while we have, in this third edition, joined the information age, we continue to retain the historical flavor of the decisions: we have reprinted verbatim the original language used in the *U.S. Reports* to introduce opinions. Students will see that during most of its history the Court used the term "Mr." to refer to justices, as in "Mr. Justice Holmes delivered the opinion of the Court" or "Mr. Justice Harlan, dissenting." In 1980 the Court dropped the "Mr." This point may seem minor, but we think it is evidence that the justices, like other Americans, have updated their usage to reflect fundamental changes in American society—in this case, the emergence of women as a force in the legal profession and shortly thereafter on the Court itself.

One thing has not changed—our intention to keep the text up to date. Each year we will produce a print supplement containing the important opinions issued by the Court since this book's publication. Our first supplement, with cases from the 1997–1998 term, will appear in October 1998; the next, with cases both from the 1997–1998 and 1998–1999 terms, will appear in October 1999. (Contact Julianne Rovesti at CQ Press, 202-887-6363, for further information.) To make the most recent opinions available before publication of the print supplement, we also maintain a web site—navigate to: <http://books.cq.com> and select the Free Resources icon—that includes excerpts of cases from the Court's current term or the term just ended.

ACKNOWLEDGMENTS

Although the first edition of this volume was published only six years ago, it had been in the works for many more. During those developmental years, numerous people provided guidance, but none as much as Joanne Daniels, a former editor at CQ Press. It was

Joanne who conceived of a constitutional law book that would be accessible, sophisticated, and contemporary. And it was Joanne who brought that concept to our attention and helped us develop it into a book. We are forever in her debt.

Because this new edition charts the same course as the first two, we remain grateful to all of those who had a hand in the previous editions. They include Brenda Carter, David Tarr, and Jeanne Ferris at CQ Press, Joseph A. Kobylka of Southern Methodist University, and our many colleagues who reviewed and commented on them: Judith A. Baer, Ralph Baker, Lawrence Baum, John Brigham, Gregory A. Caldeira, Bradley C. Canon, Robert A. Carp, Phillip J. Cooper, Sue Davis, John Fliter, John B. Gates, Edward V. Heck, Wayne McIntosh, John A. Maltese, Kevin McGuire, Susan Mezey, Richard J. Pacelle Jr., C. K. Rowland, Donald R. Songer, and Harry P. Stumpf.

We remain grateful to our copy editor, Carolyn Goldinger. She has been with this project since the first edition, and her imprint is everywhere. She continues to make our prose more accessible, to question our interpretation of certain events and opinions—and is all too often right—and to make our tables and figures understandable. We thank Megan Campion for tracking down new illustrations for this edition.

Many thanks also go to Jeffrey A. Segal for his frank

appraisal of the earlier works and his willingness to discuss even half-baked ideas for changes; to Judith Baer and Leslie Goldstein for their help with the revision of the Discrimination chapter and their answers to innumerable e-mail messages; to Jack Knight for his comments on the drafts of several chapters; and to Harold J. Spaeth for his wonderful data set.

Our home institutions provided substantial support, not complaining when presented with astronomical telephone bills, postal fees, and copying expenses. For this and all the moral support they provide, we thank all of our colleagues and staffs.

Finally, we acknowledge the support of our friends and families. We are forever grateful to our former professors for instilling in us their genuine interest in and curiosity about things judicial and legal, and to our parents for their unequivocal support. Walker expresses his special thanks to Aimee and Emily for always being there, and Epstein to her husband, Jay, for enduring all that he does not have to (but does, anyway), without complaining (much).

Any errors of omission or commission remain our sole responsibility. We encourage students and instructors alike to comment on the book and to inform us of any errors. Contact us at: *epstein@artsci.wustl.edu* or *polstw@emory.edu*.

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PART I

THE SUPREME COURT AND THE CONSTITUTION

THE LIVING CONSTITUTION

- 1. UNDERSTANDING THE U.S. SUPREME COURT**
- 2. THE JUDICIARY: INSTITUTIONAL POWERS AND CONSTRAINTS**
- 3. INCORPORATION OF THE BILL OF RIGHTS**

